COMMENT

SAVED BY THE STATES? THE VIENNA CONVENTION ON CONSULAR RELATIONS, FEDERAL GOVERNMENT SHORTCOMINGS, AND OREGON'S RESCUE

by
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After the Supreme Court case Medellín v. Texas, *the federal government has little control over the fulfillment of U.S. consular notification obligations under the Vienna Convention on Consular Relations because the decision does not force states to carry out International Court of Justice orders that are contrary to state law. This leaves compliance with the Vienna Convention largely up to the individual states. This Comment reviews Oregon's consular notification practices to assess whether this lack of federal control over the implementation of the Vienna Convention has left it toothless or if individual states may be giving it effect. This Comment suggests that through education and local police policy and procedure, Oregon has helped to implement the Vienna Convention.*

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I. INTRODUCTION

José Ernesto Medellín was executed by the state of Texas on August 5, 2008.[1] Medellín, a Mexican national who had lived in the United States since preschool, was arrested in June of 1993 for his potential involvement in gang rape and murder.[2] After being given his *Miranda* warnings, which he waived, he confessed.[3] Law enforcement officials at no time informed him of his right under international law to contact the Mexican consulate for assistance with his defense.[4] Subsequently, Medellín was convicted of capital murder and sentenced to death.[5] Mexico filed suit against the United States in the International Court of Justice (ICJ or International Court) for violations of its rights under international law, Medellín's rights, and similar violations in 51 other instances.[6]

Medellín was executed after an order was issued by the International Court to review and reconsider his case, and an opinion was issued by the United States Supreme Court holding it was powerless to enforce this order in Texas.[7] The International Court issued an order to the United States "to permit review and reconsideration of these nationals' cases by the United States courts . . . with a view to ascertaining whether in each case the violation of Article 36 committed by the competent authorities caused actual prejudice to the defendant in the process of administration of criminal justice."[8] The International Court found that the United States had violated international law, specifically the Vienna Convention on Consular Relations (VCCR or Vienna Convention), when law enforcement officers did not notify Medellín and 51 other Mexican nationals of their right to access their consulates after arrest.[9]

The Supreme Court held in *Medellín v. Texas* that without implementing legislation, the International Court's order could not force states to rehear cases where any claims the defendant had under the Vienna Convention were barred by state procedural-default rules.[10] Less

[1] David Carson, *Report: Jose Medellin*, TEXAS EXECUTION INFORMATION CENTER (Aug. 6, 2008), http://www.txexecutions.org/reports/410.asp.

[2] Medellín v. Texas, 128 S. Ct. 1346, 1354 (2008).

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, 23 (Mar. 31).

[7] *See Medellín*, 128 S. Ct. at 1353. The Supreme Court decided the case on March 25, 2008, and Medellín was executed on August 5, 2008. *Id.* at 1346; Carson, *supra* note 1. *See also* Jess Bravin, *Court Poses Test for U.S. On Arrests of Foreigners*, WALL ST. J., Jan. 20, 2009, at A5.

[8] *Avena*, 2004 I.C.J. at 60.

[9] *Id.* at 71.

[10] *Medellín*, 128 S. Ct. at 1367.

than a year after the final order was issued in the international case, the United States withdrew from the Optional Protocol that allowed Mexico a remedy with the International Court for violations of the Vienna Convention.[11]

In the United States, after the *Medellín* holding, the federal government has little control over fulfillment of United States consular notification obligations because it cannot force states to comply. Additionally, the consular notification provisions have limited power at the federal level because there are few remedies available to other state parties to the Vienna Convention or individual foreign nationals for consular notification requirement violations.[12] However, consular notification provisions may still have some force, enough to motivate individual states' compliance. The objective of this paper is to analyze the constitutional and legal difficulties the United States has in giving effect to the consular notification requirements of the Vienna Convention and to inquire whether or not these difficulties, to some extent, may be mitigated at the state level.

In Section II, I discuss the consular notification obligations that the United States, or any state party, has under the Vienna Convention and the interests that the United States has in compliance. Additionally, I analyze the International Court's interpretation of these obligations in the international litigation against the United States leading up to the *Medellín* decision. This litigation consists of only three cases: *Breard v. Greene*, filed by Paraguay in 1998; the *LaGrand Case*, filed by Germany and decided in 2001; and *Avena and Other Mexican Nationals*, filed by Mexico and decided in 2004.

In Section III, I look at the non-compliance of the U.S. federal government with the International Court's orders and the VCCR. First, I discuss the measures that the federal government took to attempt compliance with the International Court's orders and the ultimate ineffectiveness of those efforts. Then, I analyze the possible legal and constitutional justifications for the *Medellín v. Texas* holding that the International Court's orders do not constitute binding federal law. Finally, I assess the validity of these justifications and potential problems that may arise from the holding, specifically that there is no viable remedy for a Vienna Convention violation.

In Section IV, I undertake a case study of the State of Oregon. The purpose of this Section is to examine if, despite the federal government's inability to give full effect to the VCCR, foreign nationals' rights may to some extent be realized through state action. While a countrywide, state-by-state examination of consular notification practices is beyond the

[11] UNITED NATIONS, MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL 135 n.1, U.N. Doc. ST/LEG/SER.E/26, U.N. Sales No. E.09.V.3 (2009).

[12] Scott W. Lyons, *Breach Without Remedy in the International Forum and the Need for Self-Help: The Conundrum Resulting from the* Medellín *Case*, 13 LEWIS & CLARK L. REV. 73, 76–77 (2009).

scope of this paper, a case study of the state of Oregon provides an example of what steps states may be taking to give effect to the VCCR.

II. THE VIENNA CONVENTION ON CONSULAR RELATIONS—THE UNITED STATES' OBLIGATIONS, INTERESTS, AND INTERNATIONAL COURT OF JUSTICE INTERPRETATIONS

Under Article 36 of the Vienna Convention on Consular Relations, the United States has an obligation to timely notify detained foreign nationals of their right to communicate with their consulate and to allow for communication between consulates and their nationals.[13] The relevant sections delineating these requirements are:

> (1) (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
>
> (1) (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph . . . .[14]

The United States has had trouble complying with section (1) (b) of Article 36 by failing to provide notice "without delay" to foreign nationals of their right to communicate with their consulate.[15] As a result, often a foreign national's consulate is not aware that its national has been

[13] Vienna Convention on Consular Relations, art. 36, Apr. 24, 1963, 21 U.S.T. 77 [hereinafter Vienna Convention].

[14] *Id.* at art. 36 (1) (a)–(b).

[15] The United States' inability to comply with section (b) is evidenced by the three cases which have made it to the International Court: Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 248 (Apr. 9); LaGrand Case (Ger. v. U.S.), 2001 I.C.J. 466 (June 27); and Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31). In all three cases, the United States' failure to give notice and lack of consular access under Article 36, paragraph 1(b) of the Vienna Convention were at issue. *Vienna Convention on Consular Relations*, 1998 I.C.J. at 250; *LaGrand*, 2001 I.C.J. at 472; *Avena*, 2004 I.C.J. at 71. "Without delay" does not necessarily mean "immediately upon arrest," but does mean "as soon as it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national." *Avena*, 2004 I.C.J at 49. The U.S. State Department advises, "you must inform a foreign national of the possibility of consular notification by or at the time the foreign national is booked for detention . . . . The Department of State encourages judicial authorities to confirm during court appearances of foreign nationals that consular notification procedures have occurred as required." U.S. DEP'T OF STATE, CONSULAR NOTIFICATION AND ACCESS 21 (3d ed. 2010), *available at* http://travel.state.gov/pdf/cna/CNA_Manual_3d_Edition.pdf.

detained. This may be particularly problematic because the rest of the rights provided to detained foreign nationals under Article 36 are contingent upon their knowledge that they have access to their consulate, or the consulate's knowledge of their arrest. Under Article 36(1)(c), the consulate has a right to provide particular services to its detained national, including the right of the consular office "to visit a national . . . who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation."[16] The consulate cannot provide these services without the knowledge that its national has been detained. Because some foreign nationals arrested in the United States have not received notice of their rights under the VCCR, some state parties, including Paraguay, Germany, and Mexico, have sought a remedy in the International Court of Justice.[17]

Paraguay, Germany, and Mexico have been able to file suit against the United States in the International Court because the United States was party to the Vienna Convention and its Optional Protocol.[18] The United States ratified the Vienna Convention for Consular Relations and the Optional Protocol Concerning the Compulsory Settlement of Disputes in 1969.[19] The Optional Protocol states that "[d]isputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice" and that any state party to the protocol can bring suit against any other party to the protocol.[20] While the United States is still party to the Vienna Convention, it withdrew from the Optional Protocol in March 2005.[21] The United States withdrew because it kept getting sued by other state parties for its failure to give foreign nationals the requisite consular notification.[22]

Although other state parties no longer have the remedy of suing the United States in the ICJ because the United States is no longer party to the Optional Protocol, the United States is still obligated to comply with Article 36. Article 36(2) provides that the right of a detained foreign national to consular access "shall be exercised in conformity with the laws

[16] Vienna Convention, *supra* note 13, at art. 36(1)(c).

[17] Margaret E. McGuinness, Medellín v. Texas*: Supreme Court Holds ICJ Decisions under the Consular Convention Not Binding Federal Law, Rejects Presidential Enforcement of ICJ Judgments over State Proceedings*, AM. SOC'Y INT'L LAW (Apr. 17, 2008), http://www.asil.org/insights080418.cfm.

[18] *See* Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, art. 1, Apr. 24, 1963, 21 U.S.T. 325 [hereinafter Optional Protocol]; *Avena*, 2004 I.C.J. at 17; *LaGrand*, 2001 I.C.J. at 470; *Vienna Convention on Consular Relations*, 1998 I.C.J. at 249.

[19] UNITED NATIONS, *supra* note 11, at 124, 135.

[20] Optional Protocol, *supra* note 18, at art. 1.

[21] UNITED NATIONS, *supra* note 11, at 135; *see also* John Quigley, *The United States' Withdrawal from International Court of Justice Jurisdiction in Consular Cases: Reasons and Consequences*, 19 DUKE J. COMP. & INT'L L. 263, 265 (2009).

[22] Quigley, *supra* note 21, at 266.

and regulations of the receiving State," but those laws and regulations "must enable full effect to be given to the purposes for which [those] rights . . . are intended."[23]

Article 36 allows a consulate to play a large role in its citizens' defense, and the United States has an interest in allowing this extra assistance to foreign national defendants. The United States and the international community have historically recognized the importance of allowing detained or arrested foreign nationals access to their consulates.[24] Consular officers may be able to provide legal assistance, help span the divide in culture and language between the foreign legal system and their national, communicate the status of the foreign national to family, and provide reading materials and food while visiting the detainee.[25] It is easy to see how a foreign national's defense may be improved with this sort of assistance.

Some countries put a lot of resources and effort into the defense of their nationals in the United States.[26] For example, Mexico provides extensive assistance to Mexican nationals detained in the United States. In capital cases, the government of Mexico funds the Mexican Capital Legal Assistance Program which provides assistance to defense counsel for Mexican nationals by providing sample briefs and references to experts.[27] Mexico has access to additional information about the national's past and can assist a defendant by researching mitigating circumstances more thoroughly than defense counsel may otherwise be able.[28] American criminal law has a tradition of providing strong tools to the defendant and defense attorney. The theory behind this is that the defendant, once arrested, is in a greatly disadvantaged position with respect to the prosecution. The adversarial system works to neutralize this power imbalance.[29] With respect to foreign nationals, this power imbalance has the potential to be even greater given the legal, lingual, and cultural differences.[30] Consular notification and access allows for a re-balance of power. Compliance with Article 36 fits in with American

[23] Vienna Convention, *supra* note 13, at art. 36(2).

[24] *See* Yury A. Kolesnikov, *Meddling with the Vienna Convention on Consular Relations: The Dilemma and Proposed Statutory Solutions*, 40 MCGEORGE L. REV. 179, 184–85 (2009).

[25] U.S. DEP'T OF STATE, *supra* note 15, at 31.

[26] Mexico, Canada, and Paraguay all take "vigorous diplomatic and legal action to protect the consular rights of their citizens currently under a sentence of death." *Violation of the Rights of Foreign Nationals Under Sentence of Death*, DEATH PENALTY INFO. CTR. (1998), http://www.deathpenaltyinfo.org/node/802.

[27] *Foreign Nationals: Mexican Capital Legal Assistance Program (MCLAP)*, INT'L JUSTICE PROJECT, http://www.internationaljusticeproject.org/nationalsResources.cfm.

[28] ALAN W. CLARKE & LAURELYN WHITT, THE BITTER FRUIT OF AMERICAN JUSTICE: INTERNATIONAL AND DOMESTIC RESISTANCE TO THE DEATH PENALTY 60–61 (2007).

[29] *See* RUSSELL L. WEAVER ET. AL., CRIMINAL PROCEDURE: CASES, PROBLEMS AND EXERCISES 2–4, 720 (4th ed. 2010).

[30] *See* Anthony S. Winer, *An Escape Route from the* Medellín *Maze*, 25 CONN. J. INT'L L. 331, 342 (2010).

ideas of criminal justice given the United States' tradition of providing a contested and fair adversarial process to the defendant.

Additionally, the jurisdiction of the ICJ has provided countries with a forum to protest American laws under which they do not want their citizens prosecuted. In the three cases that have been adjudicated in the International Court, the state parties were trying to get their nationals off death row.[31] While their efforts were largely unsuccessful, these suits have brought international attention to American death penalty practices.[32] It is conceivable that the United States would want to use the ICJ forum in a similar way.

The International Court and Article 36 may provide the United States a forum to use in protest of another country's legal process. But beyond that, if an American citizen were subjected to a part of a legal system of another country that was inconsistent with American law, surely the United States would want to vigorously defend that citizen. The United States has an interest in protecting its citizens to the fullest extent possible in the face of a law that it deems unacceptable. "Most Americans would be justifiably appalled if a U.S. citizen in a foreign country were charged, convicted and executed for a capital crime without being advised of a right to contact the U.S. embassy for legal help."[33] As with capital crimes for other states, there could be laws in other countries that the U.S. legal system rejects as unjust and which the United States has a strong interest in fighting, especially if U.S. citizens are involved. That is the situation Paraguay, Germany, and Mexico were in when they sued the United States.

The United States has a strong interest in complying with its Article 36 obligations in order to maintain international integrity and to protect its citizens abroad. As a general matter, a treaty "depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it."[34] There are 173 parties to the Vienna Convention, all with the expectation that Article 36 creates a reciprocal relationship.[35] If State Party A is unable to uphold its end of the deal, it is hard to expect State Party B to do so with respect to State Party A's nationals. The U.S. Department of State has articulated this interest in consular access instructions to federal, state, and local law enforcement bodies:

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[31] *See* Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, 23 (Mar. 31); LaGrand Case (Ger. v. U.S.), 2001 I.C.J. 466, 477 (June 27); Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 248, 249 (Apr. 9).

[32] CLARKE & WHITT, *supra* note 28, at 64.

[33] *Id.* at 51 (quoting Editorial, *Consular Rights Executions Put Due Process for U.S. Citizens at Risk*, DETROIT FREE PRESS, Nov. 21, 2000, at 10A).

[34] Medellín v. Texas, 128 S. Ct. 1346,1357 (2008) (quoting The Head Money Cases, 112 U.S. 580, 598 (1884)).

[35] *Multilateral Treaties Deposited with the Secretary-General*, UNITED NATIONS, http://treaties.un.org/Pages/ParticipationStatus.aspx, at ch. 3, § 8.

> Always keep in mind that these are mutual obligations. In general, you should treat the foreign national as you would want an American citizen to be treated in a similar situation in a foreign country. This means you should inform the foreign national promptly and courteously [of his or her rights.] When required, you should promptly and courteously notify the foreign national's nearest consular officers so that they can provide whatever consular services they deem appropriate.[36]

The Department of State, in recommending this "golden rule" guide to consular notification and access, stresses the importance of the reciprocal nature of the Vienna Convention.[37]

The United States' interest in other state parties holding up their end of the deal became very concrete during the Iran Hostage Crisis. The United States used the Optional Protocol to file suit against Iran after an armed group attacked the American Embassy in Iran, killing two, and taking seventy people hostage.[38] In that case, the International Court issued a provisional order calling for the release of the hostages and the return of the Embassy to the United States.[39] The International Court stated "there is no more fundamental prerequisite for the conduct of relations between States than the inviolability of diplomatic envoys and embassies, so that throughout history nations of all creeds and cultures have observed reciprocal obligations for that purpose."[40] In the International Court's final decision, it found that Iran had violated its obligations to the United States under many Articles of the Vienna Convention.[41] Additionally, the International Court awarded the United States financial damages.[42] In the Iran Hostage Crisis, the United States vigorously protested Iran's lawless actions with respect to its citizens, and used the International Court, along with other diplomatic and military actions, and economic sanctions to try to get their release.[43]

While the case against Iran may be a more extreme violation of the VCCR, it is a concrete example of why the United States is interested in the validity of the convention. By fulfilling its obligations under the Vienna Convention, the United States gains integrity on the international stage and can reasonably expect its citizens traveling or living abroad to be afforded the same rights. However, the United States has not been consistent in fulfilling its obligations, leading to suits against it in the International Court.

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[36] U.S. DEP'T OF STATE, *supra* note 15, at 29.

[37] *Id.*

[38] United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran) (*Iranian Hostages II*), 1980 I.C.J. 3, 10–11 (May 24).

[39] United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran) (*Iranian Hostages I*), 1979 I.C.J. 7, 20–21 (Dec. 15).

[40] *Id.* at 19.

[41] *Iranian Hostages II*, 1980 I.C.J. at 44.

[42] *Id.* at 45.

[43] *See* Lyons, *supra* note 12, at 87–88, 92–93.

There have been three cases filed against the United States in the International Court of Justice, by Paraguay in 1998, Germany in 2001, and Mexico in 2004.[44] All three cases were death row cases.[45] In all three cases, the International Court found that the United States failed to fulfill its obligations under the VCCR by failing to notify the detained foreign national of their right to contact their consulate and failing to inform the foreign consulate that its national had been detained.[46] With each case, the measures that the ICJ took increased in firmness with respect to the United States. First, the ICJ issued provisional measures, and then it held that its provisional measures were binding. Finally, it issued final, stern judgments against the United States.[47]

In the case of *Paraguay v. United States* (hereinafter *Breard*) the International Court issued provisional measures.[48] In that 1998 case, Paraguay filed suit in the international court to stay the execution of Angel Franciso Breard.[49] Breard was convicted of culpable homicide in 1993.[50] He later, in 1996, filed for habeas relief in federal court alleging that his rights under the Vienna Convention had been violated because arresting officials had not informed him of his right to communicate with the Paraguayan consulate.[51] After some fruitless attempts at relief in the U.S. courts, Paraguay filed suit in the International Court on April 3, 1998.[52] Breard's execution was set for April 14.[53] The International Court issued a provisional order that "[t]he United States should take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings . . . ."[54]

Despite the International Court order, Breard was executed on April 14 after the United States Supreme Court held it could not order a stay of execution in *Breard v. Greene*.[55] The U.S. Supreme Court issued an opinion on the day that Breard's execution was scheduled and found that while it should give "respectful consideration" to the decision of the

[44] Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31); LaGrand Case (Ger. v. U.S.), 2001 I.C.J. 466 (June 27); Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 248 (Apr. 9).

[45] *Avena*, 2004 I.C.J. at 23; *LaGrand*, 2001 I.C.J. at 475; *Vienna Convention on Consular Relations*, 1998 I.C.J. at 249.

[46] *Avena*, 2004 I.C.J. at 71; *LaGrand*, 2001 I.C.J. at 515; *Vienna Convention on Consular Relations*, 1998 I.C.J. at 249.

[47] *Avena*, 2004 I.C.J. at 70–71; *LaGrand*, 2001 I.C.J. at 514–16; *Vienna Convention on Consular Relations*, 1998 I.C.J. at 258.

[48] *See Vienna Convention on Consular Relations*, 1998 I.C.J. at 258.

[49] *Id.* at 249–51.

[50] *Id.* at 249; Curtis A. Bradley, Breard, *Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529, 532–33 (1999).

[51] Bradley, *supra* note 50, at 533.

[52] *Vienna Convention on Consular Relations*, 1998 I.C.J. at 251.

[53] *Id.* at 249

[54] *Id.* at 258.

[55] 523 U.S. 371, 377–79 (1998).

International Court, the procedural rules of the United States govern the Vienna Convention's application in the United States.[56] Here, Breard had procedurally defaulted his Vienna Convention claim when he did not bring it up at his trial in Virginia state court.[57] Further, the Court found that when a federally enacted statute was made into law after a treaty, that statute would trump any contrary treaty provisions.[58] In this case, Congress had recently enacted the Antiterrorism and Effective Death Penalty Act "which provides that a habeas petitioner alleging that he is held in violation of 'treaties of the United States' will, as a general rule, not be afforded an evidentiary hearing if he 'has failed to develop the factual basis of [the] claim in State court proceedings.'"[59] This rule, the Supreme Court found, precluded Breard from bringing any Vienna Convention claims.[60] Finally, the Supreme Court found it unlikely that further litigation of the Vienna Convention claims would change the outcome of Breard's conviction.[61] The Supreme Court concluded that if the Governor of Virginia "wishe[d] to wait for the decision of the ICJ, that [was] his prerogative. But nothing in . . . existing case law allow[ed] [the Court] to make that choice for him."[62] While it's arguable that the Court's refusal to grant a stay of execution was appropriate due to federalism concerns,[63] some of the Justices found that the decision was made too hastily given the gravity of the case and the international law at play.[64] The International Court, as evidenced by its later cases, is more in line with the latter view.

In *LaGrand Case (Germany v. United States)* (hereinafter *LaGrand)*,[65] the International Court increased pressure on the United States to comply with its provisional measures. Similar to *Breard*, in *LaGrand*, the United States did not comply with the International Court's provisional orders.[66] In *LaGrand*, two brothers, German nationals, were charged and convicted of attempted armed robbery, kidnapping, and first-degree murder after they tried to rob a bank and stabbed the bank owner to

[56] *Id.* at 375.

[57] *Id.* at 375–76.

[58] *Id.* at 376.

[59] *Id.* (quoting 28 U.S.C. § 2254(a), (e)(2) (1994 & Supp. IV 1998)).

[60] *Id.*

[61] *Id.* at 377. Breard was given access to two attorneys and could communicate with his family. Bradley, *supra* note 50, at 533. He pled not guilty against the advice of his attorneys. *Id.* This was enough to convince the court that it was extremely unlikely that the outcome of the case would have changed. *Breard*, 523 U.S. at 377.

[62] *Breard*, 523 U.S. at 378.

[63] *See* Bradley, *supra* note 50, at 566.

[64] *See Breard*, 523 U.S. at 380 (Stevens, J., dissenting) ("I would therefore grant the applications for a stay, and I respectfully dissent from the decision to act hastily rather than with the deliberation that is appropriate in a case of this character.").

[65] 2001 I.C.J. 466 (June 27).

[66] *Id.* at 516.

death.[67] They were sentenced to death.[68] The brothers did not learn of their right to contact their consulate until 1994, eight years after their conviction, and not from the state of Arizona, but from other prisoners.[69] Germany, after attempting other remedies in U.S. courts, filed a last minute lawsuit (the day before the scheduled execution of Walter LaGrand), in the International Court asking for provisional measures.[70] The International Court immediately issued an order to the United States to "take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings."[71] In spite of this order, Walter LaGrand was executed as scheduled on March 3, 1999.[72]

The United States' argument for non-compliance was that Germany's late filing in combination with the U.S. federalist system made immediate action difficult.[73] The U.S. Supreme Court rejected a suit filed by Germany attempting to stay the execution because of "the tardiness of the pleas and the jurisdictional barriers they implicate."[74] Additionally, the United States made arguments in the international case in opposition to the International Court's acting as a final court of appeal for U.S. criminal cases. The United States argued Germany was using the ICJ forum in this manner as a workaround of the U.S. judicial system.[75]

Germany continued with the case after the execution of Walter LaGrand, which led to a holding by the International Court that its provisional measures are binding upon the parties, and that Article 36 creates individual rights for foreign nationals. The International Court found that the United States breached its obligation to Germany under Article 36 when it failed to give Walter and Karl LaGrand notice of their right to contact their consulate, and further breached its obligation when it did not follow the International Court's provisional order and stay the execution of Walter LaGrand.[76] Further, the International Court found that Article 36 not only provided rights to the "sending state" (Germany in this case) but also created an individual right of the foreign national.[77]

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[67] *Id.* at 475.

[68] *Id.*

[69] *Id.* at 477; Anthony N. Bishop, *The Unenforceable Rights to Consular Notification and Access in the United States: What's Changed Since the* LaGrand Case*?*, 25 HOUS. J. INT'L L. 1, 36 (2002).

[70] *LaGrand*, 2001 I.C.J at 478–79.

[71] *Id.* at 479.

[72] *Id.* at 479–80.

[73] Bishop, *supra* note 69, at 36 n.207; *see also* Frederic L. Kirgis, *World Court Rules Against the United States in* LaGrand Case *Arising from a Violation of the Vienna Convention on Consular Relations*, AM. SOC'Y INT'L L. (July 2001), http://www.asil.org/insigh75.cfm.

[74] Federal Republic of Germany v. United States, 526 U.S. 111, 112 (1999).

[75] *LaGrand*, 2001 I.C.J. at 485.

[76] *Id.* at 515–16.

[77] *Id.* at 492.

The International Court articulated this right and explained that both Germany and the LaGrands had rights under the convention:

> It is immaterial for the purposes of the present case whether the LaGrands would have sought consular assistance from Germany, whether Germany would have rendered such assistance, or whether a different verdict would have been rendered. It is sufficient that the Convention conferred these rights, and that Germany and the LaGrands were in effect prevented by the breach of the United States from exercising them, had they so chosen.[78]

While the ICJ did not intend to make this recognition of individual rights binding on U.S. courts, it did perhaps hope to nudge U.S. courts in that direction.[79] As will be discussed in further detail in the discussion of the *Medellín* case, the United States has yet to affirmatively recognize this individual right.[80]

Furthermore, in *LaGrand*, the International Court held that its provisional measures are binding on the parties. The International Court had never before examined whether its provisional measures (similar to a preliminary injunction) are binding.[81] In *LaGrand*, the International Court found that its provisional order to the United States "was not a mere exhortation. It had been adopted pursuant to Article 41 of the [ICJ Statute]. This Order was consequently binding in character and created a legal obligation for the United States."[82] Unlike Paraguay in the *Breard* case, Germany stuck with their case in the International Court, leading to this firmer decision by the ICJ that the United States had a legal obligation to comply with its provisional orders. The International Court also found that the United States, by means of its own choosing, should "allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights" in Article 36.[83] This recommendation to the United States set the stage for the final Article 36 case to come before the International Court: *Avena and Other Mexican Nationals* (hereinafter *Avena*).[84]

In *Avena*, the International Court recognized a wider scope of Vienna Convention violations by the United States. While both *Breard* and *LaGrand* had involved one individual, the *Avena* litigation involved 51 Mexican nationals that Mexico argued had been denied their rights to

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[78] *Id.*

[79] Kirgis, *supra* note 73 ("The World Court ruling on this point would not automatically confer rights on individuals that could be asserted in a US court. Nevertheless, a US court might consider it a persuasive interpretation of paragraph (1)(b) that could tip the scales in favor of enforceable individual rights in a future domestic case.").

[80] *See infra* notes 136–146 and accompanying text.

[81] *LaGrand*, 2001 I.C.J. at 501.

[82] *Id.* at 506.

[83] *Id.* at 514.

[84] 2004 I.C.J. 12 (Mar. 31).

consular access.[85] Mexico has extensive programs in place in the United States for the express purpose of protecting its nationals in death penalty cases.[86] The court issued another provisional order that the imminent executions of three nationals were to be stayed until the final judgment was issued.[87] This time the United States complied.[88]

In its final decision, the International Court ordered a remedy for the nationals whose rights under Article 36 had been violated. The International Court found that the United States had violated its obligations with respect to the Mexican nationals when it did not provide them with notice of their right to contact the Mexican consulate.[89] There was a further violation of Article 36 when the United States failed to notify the Mexican consulate of its detained nationals and allow the consulate to provide legal assistance.[90] The International Court found the appropriate remedy was for the United States "by means of its own choosing" to provide "review and reconsideration of the convictions and sentences of the Mexican nationals."[91]

In *Avena*, the International Court further clarified what it meant by the term "review and reconsideration" that it first set out in the *LaGrand* case. The "review and reconsideration" should take into account Article 36 of the Convention, should be of both the conviction and the sentence, and "should occur within the overall judicial proceedings relating to the individual defendant concerned."[92] The International Court further found that the procedural-default rule could not prevent the United States from giving full effect to the purpose of Article 36, and could not interfere with the "review and reconsideration."[93] Given this order and the United States' past noncompliance with ICJ orders, one question remained: Would anything be different this time around such that the Mexican nationals would receive the "review and reconsideration" remedy for the United States' violations of Article 36?

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[85] *Id.* at 23.

[86] It is arguable that Mexican involvement makes a real difference in defense, perhaps more than with other countries, leading to its heightened interest in knowing about convicted nationals in capital cases. *See* CLARKE & WHITT, *supra* note 28, at 64; *see also* William J. Aceves, *Consular Notification and the Death Penalty: The ICJ's Judgment in* Avena, AM. SOC'Y INT'L L. (Apr. 2004), http://www.asil.org/insigh130.cfm.

[87] *Avena*, 2004 I.C.J. at 17.

[88] *Id.*

[89] *Id.* at 71.

[90] *Id.* at 71–72.

[91] *Id.* at 72.

[92] *Id.* at 65–66.

[93] *Id.* at 57.

III. THE UNITED STATES' RESPONSE TO THE INTERNATIONAL COURT'S ORDERS—AND CONSTITUTIONAL GROUNDS FOR NONCOMPLIANCE

In all three international cases, there was a clear breach of Article 36 by the United States, a finding that the United States itself did not contest. The real problem the federal government faced was what to do about the breach and whether or not United States procedural-default rules prevent those claims from being raised. In all three cases, the United States did attempt compliance with the ICJ's orders. In the Breard case, Secretary of State Madeline Albright encouraged Virginia to comply with the ICJ's order.[94] Additionally, the United States did what it argued to the Supreme Court was the "traditional remedy for a failure of consular notification—a formal apology and a pledge to improve future compliance."[95] Similar measures were taken in the *LaGrand* case. The United States apologized to Germany and gave "a commitment to ensure implementation of measures to comply with its obligations under [Article 36]."[96] However, that *LaGrand* and *Avena* even got to the International Court suggests that the United States' pledge to do better was not good enough. The federal government, at least the executive branch, seemed to agree. President Bush's actions following the *Avena* decision show that the executive branch recognized the importance of compliance and the ongoing failure of the federal government to comply with its obligations under the VCCR.

After the *Avena* order, President Bush issued a memorandum to the states to give effect to the ICJ's decision in *Avena*:

> I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its international obligations under the decision of the International Court of Justice in the *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America) (Avena)*, 2004 ICJ 128 (Mar. 31), by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.[97]

While the power of the president to make an enforceable order of this nature was tenuous at the time (and now determined to be nonexistent), it is clear that the executive branch attempted to comply with the ICJ's

[94] Letter from Madeleine K. Albright, U.S. Sec'y of State, to James Gilmore III, Governor of Va. (Apr. 13, 1998), http://www.state.gov/documents/organization/65744.pdf.

[95] Bradley, *supra* note 50, at 537.

[96] Kirgis, *supra* note 73.

[97] Memorandum from President George W. Bush to the U.S. Att'y Gen. (Feb. 28, 2005), *available at* http://www.brownwelsh.com/Archive/2005-03-10_Avena_compliance.pdf.

order.[98] Furthermore, after the *Avena* order the United States took further measures to comply when it sent letters to the relevant state courts and had diplomatic discussions to find alternatives to "review and reconsideration."[99] These actions show that the United States recognized the importance of compliance with the judgment to "smooth out U.S. relations with Mexico,"[100] help repair U.S. international integrity with respect to Article 36, and to encourage compliance with respect to U.S. citizens abroad. As these measures were taken, a case concerning one of the Mexican nationals in the *Avena* decision, José Ernesto Medellín, was making its way to the Supreme Court.

Ultimately, in *Medellín v. Texas* the Supreme Court held that states did not have to comply with the order issued by the International Court, even with the reinforcement of a memorandum from the executive branch. The Court held that "neither *Avena* nor the President's Memorandum constitutes directly enforceable federal law that pre-empts state limitations on the filing of successive habeas petitions."[101] This holding implies both constitutional (treaty and presidential order preemption of state law) and legal (state limitations) blocks to compliance with the ICJ's decision.

The Court found that the Supremacy Clause of the Constitution does not require the states to comply with the ICJ's order. First, the Court addressed the question of "whether the *Avena* judgment has automatic *domestic* legal effect such that the judgment of its own force applies in state and federal courts."[102] It addressed this question independent of the President's Memorandum to comply with the *Avena* order. The Supremacy Clause states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[103]

Generally, the Court has found, with implementing legislation by Congress, that treaties may preempt state law under the Supremacy Clause.[104] However, without implementing legislation, a treaty only preempts state law if it is self-executing.[105] A self-executing treaty is one that standing alone creates rights without any further action by the

[98] *See* Frederic L. Kirgis, *The* Avena *Case in the International Court of Justice and the U.S. Response*, 17 FED. SENT'G REP. 223, 224 (2005).

[99] Lyons, *supra* note 12, at 83.

[100] Kirgis, *supra* note 98, at 224.

[101] Medellín v. Texas, 128 S. Ct. 1346, 1353 (2008).

[102] *Id.* at 1356.

[103] U.S. CONST. art.VI, cl. 2.

[104] *See* Missouri v. Holland, 252 U.S. 416, 433–34 (1920).

[105] *Medellín*, 128 S. Ct. at 1356.

legislature or, in other words, is "equivalent to an act of the legislature."[106] In contrast, a treaty that is non-self-executing is one that needs further action by Congress before the courts can give effect to its provisions, or one that the "legislature must execute."[107] The rationale for this distinction is that a self-executing treaty is ratified with the understanding that it will have domestic legal effect while a non-self-executing treaty is not, and therefore any possible abrogation of domestic laws does not have the constitutionally required support of the Executive's treaty power with the advice and consent of the senate.[108]

The *Medellín* Court concluded that the ICJ's judgment, while an "international law obligation," did not constitute binding federal law because there was no relevant self-executing international law or implementing legislation from Congress.[109] To determine that the Vienna Convention was not self-executing, the Court looked at the text of the relevant international law and the ratifying executive and senate intent to create binding domestic law.[110] The Court examined three international texts: the Optional Protocol, Article 94 of the UN Charter, and the International Court of Justice's Statute.[111]

The Court found the Optional Protocol to be a bare grant of jurisdiction to the International Court that does not give the International Court any authority to create domestic law.[112] Article 94 of the UN Charter was found by the Court to be a commitment to take future action and does "not provide that the United States 'shall' or 'must' comply with an ICJ decision."[113] The Court further found that the ICJ statute expressly indicated that decisions by the ICJ have "*no binding force* except between the parties and in respect of that particular case."[114] From this examination of the texts of international law documents, the Court found that the Executive, with the advice of the Senate, could not have possibly meant any of them to be self-executing.

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[106] *Id.* (quoting Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829)); *see also* McGuinness, *supra* note 17.

[107] *Medellín*, 128 S. Ct. at 1362 (quoting *Foster*, 27 U.S. (2 Pet.) at 314); *see also* McGuinness, *supra* note 17.

[108] U.S. CONST. art. II, § 2, cl. 2; *Medellín*, 128 S. Ct. at 1369; *see generally* Ben Geslison, Recent Development, *Treaties, Execution, And Originalism in* Medellín v. Texas, *128 S. Ct. 1346 (2008)*, 32 HARV. J.L. & PUB. POL'Y 767 (2009) (arguing that presumption of non-self-executing treaties is valid); *but cf.*, D.A. Jeremy Telman, Medellín *and Originalism*, 68 MD. L. REV. 377, 401 (2009) ("[T]he majority opinion cannot be reconciled with even a faint-hearted version of originalism").

[109] *Medellín*, 128 S. Ct. at 1357.

[110] *Id.* at 1356–67.

[111] *Id.* at 1358–60.

[112] *Id.* at 1358.

[113] *Id.*

[114] *Id.* at 1360 (quoting Statute of the International Court of Justice art. 59, June 26, 1945, 59 Stat. 1055) (emphasis added by Court).

The second constitutional question that the *Medellín* Court addressed was "does the President's Memorandum independently require the States to provide review and reconsideration . . . without regard to state procedural default rules?"[115] To answer this question, the Court examined the two arguments that the Executive put forth as a basis for its power to issue and enforce the memorandum, the first of which was that the President had the power to carry out the *Avena* judgment because of the underlying treaties. The second was that the presidential power to undertake "'independent' international dispute-resolution" allowed the President to implement the *Avena* judgment.[116]

The Court found that the underlying international treaties did not give the President authority to enforce the ICJ's order because the President was acting without congressional consent. The President's attempt to enforce the order fell under the third category of the *Youngstown Sheet & Tube Co. v. Sawyer* framework because it was against the "implicit understanding of the ratifying senate."[117] Further, the Court found that the President's Memorandum was against the wishes of the ratifying Senate because it gave Vienna Convention provisions binding domestic effect, something that a non-self-executing treaty would not do.[118] Under the third category of *Youngstown*, presidential power is at its "lowest ebb," and therefore the Court rejected the President's first argument.[119]

The Court further found unpersuasive the argument that the President has an "'independent' international dispute-resolution power" that allowed him to independently give effect to the ICJ order.[120] The Court recognized presidential unilateral authority to settle international disputes in some cases. But it found these cases to be limited to those that had a long history of congressional consent to executive power to resolve specific types of international disputes.[121] Such "'longstanding practice'

[115] *Id.* at 1353.

[116] *Id.* at 1368.

[117] *Id.* at 1369 (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring)). Justice Jackson's concurrence provides a three-part analysis for evaluating the Executive's action: First, when the President is acting pursuant to an express or implied authorization of Congress, then presidential authority is at its maximum and "[i]f his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power." *Youngstown*, 343 U.S. at 636–37. Second, when the president acts alone without the authorization of Congress, "he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority . . . ." *Id.* at 367.The final category is when the President acts contrary to the express or implied will of Congress and presidential power is at its lowest ebb. *Id.* at 637–38.

[118] *Medellín*, 128 S. Ct. at 1369.

[119] *Id.* at 1371; *Youngstown*, 343 U.S. at 637–38.

[120] *Medellín*, 128 S. Ct. at 1368, 1372.

[121] *Id.* 1371–72 (finding that presidential authority only extended to cases that involved "the making of executive agreements to settle civil claims between American

of congressional acquiescence" was not present with the power the President was attempting to exercise.[122] Instead, the Court found the President's act to be an unprecedented infringement on traditional state police power and control of criminal procedure.[123]

In light of these constitutional considerations, the Court found there to be a legal limitation on giving full effect to the ICJ's order: state limitations on successive habeas petitions barred by procedural-default rules.[124] The procedural-default doctrine is the principle that claims in a habeas corpus petition that were not raised at the appropriate time at any level of a state court proceeding cannot later be reviewed on the merits in federal court.[125] While the International Court asks that its order be given effect despite procedural-default rules, the U.S. Supreme Court found that the order did not trump state procedural rules:

> In sum, while the ICJ's judgment in *Avena* creates an international law obligation on the part of the United States, it does not of its own force constitute binding federal law that pre-empts state restrictions on the filing of successive habeas petitions. As we noted in *Sanchez-Llamas*, a contrary conclusion would be extraordinary, given that basic rights guaranteed by our own Constitution do not have the effect of displacing state procedural rules.[126]

The Court found that without the requisite self-executing treaty or legislation by Congress, the international law plus the President's Memorandum was insufficient to invoke the Supremacy Clause such that the International Court's order could be given effect.[127]

While, constitutionally the Court's reasoning is sound, the *Medellín* decision has some important ramifications for foreign nationals arrested in the United States and the United States' international reputation. In analyzing the reasoning of the Court, I look at its effect with respect to the various relationships it discusses or affects, including the federal government with respect to the states, the executive branch with respect to the other branches, the United States with respect to the international community, and the United States and its relationship with foreign nationals.

The federalism concerns that the Court relies upon are valid. If, as the majority concludes, the international law at play is non-self-executing, then the reasoning that the Supremacy Clause does not force the VCCR

citizens and foreign governments or foreign nationals" and that these cases were based on a "'particularly longstanding practice' of congressional acquiescence" (quoting Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 415 (2003)). *See* Dames & Moore v. Regan, 453 U.S. 654, 679 (1981); *see also Garamendi*, 539 U.S. at 415.

[122] *Medellín*, 128 S. Ct. at 1372 (quoting *Garamendi*, 539 U.S. at 415).

[123] *Id.*

[124] *See id.* at 1367.

[125] CLARKE & WHITT, *supra* note 28, at 54.

[126] *Medellín*, 128 S. Ct. at 1367.

[127] *Id.* at 1371–72.

to preempt state procedural rules is sound. The Court is concerned with the breadth of international law that could become domestically enforceable and that the ICJ could become the final "criminal court of appeals." By finding all applicable international law to be non-self-executing, the Court can evade these worries. It is legitimate that a treaty should not be construed to be binding domestic law if the ratifying Senate and Executive did not intend it to be. By not forcing the states to reopen old, already litigated cases, the Court recognized the autonomy of state legislatures and judiciaries to manage criminal proceedings.[128] Additionally, there is a legitimate interest in the finality of cases that the procedural-default rule provides.[129]

If there is any possibility that the international law is self-executing, the majority's opinion is on shakier ground.[130] The dissent, comprised of three Justices, found the Optional Protocol to be self-executing.[131] If the international law is deemed to be self-executing, the Supremacy Clause is in full force and the Supreme Court has the power to force the states to comply with the ICJ order. Perhaps, as the dissent would hold, this would come in the form of a remand for the "review and reconsideration" that the ICJ prescribes.[132]

While the President's Memorandum was a valiant effort to force compliance with the *Avena* judgment, the Court reasonably rejected the United States' arguments as to the scope of presidential power. While again, this section of the opinion relied heavily on the non-self-executing nature of the international law involved, the unprecedented nature of the President's Memorandum and a lack of legislative support for such an order supports the Majority's opinion. It can be argued that the President's Memorandum in conjunction with the existing treaties is a strong showing of constitutional authority over the states. Perhaps a small extension of the executive authority to mediate international disputes is

[128] Ted Cruz, *Defending U.S. Sovereignty, Separation of Powers, and Federalism in* Medellín v. Texas, 33 HARV. J.L. & PUB. POL'Y 25, 34 (2010) ("Thus, the federal government may not commandeer the machinery of state government to implement federal policy. Indeed, the Constitution 'recognizes and preserves the autonomy and independence of the States—independence in their legislative and . . . judicial departments.'" (quoting Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78–79 (1938)).

[129] *Id.* at 27 ("It is a bedrock principle of American criminal procedure that rights not preserved at trial cannot later be used to collaterally attack a conviction. In this case, Medellín's lawyers never raised the Vienna Convention at trial, and so the habeas court held that any claim under that treaty was procedurally defaulted." (footnote omitted)).

[130] The majority opinion only very briefly addresses the self-executing nature of the VCCR itself as it was not a question before the Court. *Medellín*, 128 S. Ct. at 1357 n.4. *See also* Cindy Galway Buys, *The United States Supreme Court Misses the Mark: Towards Better Implementation of the United States' International Obligations*, 24 CONN. J. INT'L L. 39, 49 (2008).

[131] *Medellín*, 128 S. Ct. at 1376 (Breyer, J., dissenting).

[132] *Id.* at 1388–89 (Breyer, J., dissenting).

warranted in a situation such as this one where the United States' international reputation is at stake.

The federalism and separation of powers issues decided by the Supreme Court, while validly grounded in the Constitution, created a situation where the United States could not give full effect to its international obligations, straining the relationship between the United States and the international community on this issue.[133] The Court believes that its holding does not completely leave the Vienna Convention toothless because it finds it to be an international obligation that can be pursued through diplomatic and political conduits.[134] However, the international community has not found this to be enough. Many countries filed amicus briefs in favor of Medellín.[135] Mexico, a country that has been actively involved in the defense of its nationals in U.S. courts, continued to challenge the case on the international stage.[136] The *Medellín* opinion could be read as a holding that state procedural rules take priority over international law, even after the International Court suggested otherwise.[137]

The largest problem that *Medellín* and prior precedent creates is with respect to the relationship between the U.S. government and foreign nationals arrested or detained within its borders. Availability of a judicial remedy is essential to the American legal system; however, such a judicial remedy is not readily available to a foreign national whose rights under the VCCR have been violated. The Court has consistently aligned with Justice Marshall's view in *Marbury v. Madison* that "[t]he government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."[138] Despite this routinely upheld principle, foreign nationals who are not notified of their right to consular access may not have a remedy.[139]

An argument can be made that the Vienna Convention does not create a legal right for individuals since it is an agreement between state parties. Article 36(2) suggests otherwise and calls for exercise of the

[133] *See id.* at 1391 (Breyer, J., dissenting).

[134] *Id.* at 1365 (majority opinion).

[135] *See* Catherine Ross Dunham, *Do Decisions from the International Court of Justice and Presidential Memoranda Act Together to Preempt State Law?*, 35 PREVIEW U.S. SUP. CT. CAS. 13, 17 (2007).

[136] *See* Request for Interpretation of the Judgment, Avena and Other Mexican Nationals (Mex. v. U.S.) (June 5, 2008), *available at* http://www.icj-cij.org/docket/files/139/14582.pdf.

[137] Ronald A. Brand, *Treaties and the Separation of Powers in the United States: A Reassessment After* Medellín v. Texas, 47 DUQ. L. REV. 707, 723 (2009) ("The outcome of the case depended not on whether international law was applicable in U.S. courts (as part of federal law), but on whether state procedural rules trump federal substantive law in state court proceedings.").

[138] 5 U.S. (1 Cranch) 137, 163 (1803).

[139] *See* Lyons, *supra* note 12, at 75.

article "in conformity with the laws and regulations of the receiving State" but still must be exercised as to "enable full effect to be given to the purposes for which the rights accorded under this Article are intended."[140] The Supreme Court has never made a conclusive determination on this point.[141] The circuit courts are split on this issue.[142] Regardless, there is not much of a remedy for other state parties or individuals whose Vienna Convention rights have been violated.[143] State parties do not have a remedy against the United States because they can no longer sue the United States in the International Court.[144] Individuals do not have a judicial remedy for a Vienna Convention violation.[145] As the *Medellín* Court concluded, foreign nationals may not raise Vienna Convention challenges to their sentences or convictions in post-trial proceedings unless they raised the issue at trial because of the procedural-default doctrine.[146]

Additionally, in *Sanchez-Llamas v. Oregon*, the Supreme Court found that "suppression is not an appropriate remedy for a violation of Article 36, and that a state may apply its regular rules of procedural default to Article 36 claims."[147] The Court found suppression to be inappropriate because it is a remedy that is generally reserved for constitutional violations.[148] Furthermore, the Court found that the purpose of suppression did not encourage its use for Vienna Convention violations. Part of the purpose of suppression is to exclude evidence and confessions that are unreliable because they were obtained through coercion, in violation of the Fourth and Fifth Amendments.[149] The Court did not see a lack of consular notification as leading to a coerced and unreliable confession.[150] It found that other constitutional rights, such as due process, *Miranda* warnings, and the right to counsel, extended to foreign nationals arrested in the United States and were sufficient to protect the interests of Article 36.[151]

In a pamphlet entitled *Consular Notification and Access*, the U.S. Department of State provided its opinion on available remedies in the United States for Vienna Convention violations:

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[140] Vienna Convention, *supra* note 13, at art. 36(2).

[141] *See* Medellín v. Texas, 128 S. Ct. 1346, 1357 n.4 (2008).

[142] *See* Howard S. Schiffman, Breard *and Beyond: The Status of Consular Notification and Access Under the Vienna Convention*, 8 CARDOZO J. INT'L & COMP. L. 27, 37–44 (2000).

[143] *See* Lyons, *supra* note 12, at 76–77; *see also* Julian G. Ku, *The State of New York Does Exist: How the States Control Compliance with International Law*, 82 N.C. L. REV. 457, 497 (2004).

[144] *See supra* notes 18–23 and accompanying text.

[145] Ku, *supra* note 143, at 509.

[146] *See Medellín*, 128 S. Ct. at 1367.

[147] 548 U.S. 331, 337 (2006).

[148] *Id.* at 348.

[149] *Id.* at 349.

[150] *Id.*

[151] *Id.* at 350.

> Q: What remedy might the foreign national or his or her country have if I failed to go through consular notification procedures?
>
> A. The judicial remedies available to a foreign national alleging a violation of consular notification requirements vary by jurisdiction. Foreign nationals have sought money damages for alleged violations, though such suits are rarely successful. Some foreign nationals have also sought review of their convictions or sentences, claiming trial counsel provided ineffective assistance by not raising the consular notification violation at trial. The most significant consequence, however, is that the United States will be seen as a country that does not take its international legal obligations seriously.[152]

This passage reveals that the State Department recognizes that there is no real remedy for a Vienna Convention violation. There are simply international "consequences." Whether or not *Medellín* was correctly decided, the bottom line is that because of the nature of most criminal proceedings, compliance with the Vienna Convention is largely left up to the states.

IV. OREGON

In the past, Oregon law enforcement has not always complied with Article 36, which opens the door for foreign nationals to use lack of consular notification as part of their defense. Multiple cases have made it to the Oregon Supreme Court. In *State v. Reyes-Camarena*, Horacio Alberto Reyes-Camarena was arrested after he robbed and stabbed two women, resulting in the death of one.[153] After his arrest, police read him his *Miranda* rights in English and Spanish, but failed to notify him of his right to access his consulate or inform the Mexican consulate of his arrest.[154] Additionally, in *State v. Chavez*, police failed to notify Victor Hugh Tumbaco Chavez, an Ecuadorian national, of his rights under the Vienna Convention.[155] After his arrest, Chavez made incriminating statements to the police.[156]

Then, an Oregon Vienna Convention case made it to the United States Supreme Court. In *Sanchez-Llamas v. Oregon*, Moises Sanchez-Llamas, a Mexican national, was involved in a shootout with police.[157] One officer was shot in the leg.[158] After his arrest and *Miranda* warnings, Sanchez-Llamas made incriminating statements.[159] Sanchez-Llamas was never informed by police of his right to contact the Mexican consulate.[160]

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[152] U.S. DEP'T OF STATE, *supra* note 15, at 31.
[153] 7 P.3d 522, 524 (Or. 2000).
[154] *Id.*
[155] 56 P.3d 923 (Or. 2002).
[156] *Id.* at 924.
[157] 548 U.S. 331, 339 (2006).
[158] *Id.*
[159] *Id.* at 339–40.
[160] *Id.* at 340.

In *Reyes-Camarena*, *Chavez*, and *Sanchez-Llamas*, Oregon conceded that the defendants had not been advised of their consular rights.[161] However, the Oregon Supreme Court in *Reyes-Camarena* and *Chavez* did not reach the merits of the Vienna Convention claims because it found that they had defaulted those claims by not raising them at the appropriate time.[162] Furthermore, in *Sanchez-Llamas* the United States Supreme Court found suppression was not an appropriate remedy for Vienna Convention violations.[163] After the *Sanchez-Llamas* decision was announced, the Oregon Attorney General, Hardy Myers, expressed mixed feelings over the result. While Myers felt the victory was "significant" because it upheld a "hard-won conviction," he also recognized the need for ongoing efforts to comply with the Vienna Convention in Oregon.[164] Since these three cases, Oregon has taken steps to give effect to the Vienna Convention.

The Oregon legislature, while not expressly requiring notification by the detaining officer, has taken steps to ensure that Oregon police are aware of their duties under the Vienna Convention. Education about the right to consular access under the Vienna Convention is a step in the right direction for Oregon law enforcement because many law enforcement officers had not even been aware of the consular notification requirements.[165] Notably, prior to a letter sent to the House Judiciary Committee in late 2002, state lawmakers were unaware of the requirements of the Vienna Convention.[166]

In 2003, the Oregon legislature considered House Bill 2047. The bill proposed a new Oregon law that would require a police officer, who "in any way detains a person" whom they reasonably suspect to be a foreign national, to inform the detained person of their right to communicate with their consulate.[167] Other states, such as California and Florida, have

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[161] *Id.*; *Chavez*, 56 P.3d at 924–25; State v. Reyes-Camarena, 7 P.3d 522, 524 (Or. 2000).

[162] *See Chavez*, 56 P.3d at 925; *Reyes-Camarena*, 7 P.3d at 526.

[163] *See supra* notes 147–51 and accompanying text.

[164] Media Release, Or. Dep't of Justice, *US Supreme Court Upholds Oregon Conviction in Sanchez-Llamas Case* (June 28, 2006), http://www.doj.state.or.us/releases/2006/rel062806.shtml ("'However, the decision does not lessen the importance of improving state and local law enforcement compliance with the treaty.' Myers pledged to continue efforts to work with foreign governments and with state and local law enforcement to improve compliance.").

[165] *See Public Hearing on H.B. 2047 Before the H. Comm. on the Judiciary*, 2003 Leg., 72d Leg. Assemb., Reg. Sess. (Or. Feb. 17, 2003) [hereinafter *Hearing on H.B. 2047*], *recording available at* http://landru.leg.state.or.us/listn/listenset.htm.

[166] *Id.*

[167] H.R. 2047, 72d Leg. Assemb., Reg. Sess. (Or. 2003). Section 1 of the bill as introduced read:

> Be It Enacted by the People of the State of Oregon:
>
> (1) When a police officer or reserve officer in any way detains a person, and the police officer or reserve officer reasonably suspects that the person is a foreign national, the police officer or reserve officer shall inform the person,

enacted similar statues that mirror the Article 36 provisions of the Vienna Convention in order to give it local effect.[168] However, this provision of the bill was not enacted because of concerns with the definition of detention as defined by Oregon law, the potential for employer liability for officers' failure to comply with the statute, and the breadth of the statute's language, which required notification in every detention (a higher standard than that of the State Department).[169]

Instead, the Oregon legislature passed into law provisions requiring police to understand the rights provided by the Vienna Convention. In 2003, an amendment was made to section 181.642 of the Oregon Revised Statutes, which required all police officers to be trained to "[u]nderstand the requirements of the Vienna Convention on Consular Relations and identify situations in which the officers are required to inform a person of the person's rights under the convention."[170] This law was implemented by the Department of Public Safety Standards and Training (DPSST), which provides most of the training to new law enforcement officers.[171] For newly hired officers, the DPSST incorporated information regarding the Convention into its training.[172] For current officers, it posted materials created by the State Department on its website and required a mandatory reading of the materials.[173] These materials include a "30-40 minute presentation, booklet, poster, passport flyer, and article."[174]

In addition to legislative action, the Oregon Department of Justice has encouraged compliance with the Vienna Convention. In 2000, the attorney general created a group to consider ways that Oregon could improve compliance with the VCCR.[175] The group included the Mexican Consul General for Oregon, the Oregon American Civil Liberties Union, the Oregon Criminal Defense Lawyers Association, the Oregon State Sheriffs Association, and the Oregon District Attorneys Association.[176]

> without delay, of the person's right to communicate with an official from the consulate of the person's country.
>
> (2) A police officer or reserve officer is not civilly or criminally liable for failure to provide the information required by this section. Failure to provide the information required by this section does not in itself constitute grounds for the exclusion of evidence that would otherwise be admissible in a proceeding.
>
> (3) As used in this section, 'police officer' and 'reserve officer' have the meanings given those terms in ORS 181.610.

[168] *See* CAL. PENAL CODE § 834c (West 2008); FLA. STAT. ANN. § 288.816(2)(f) (West 2008).

[169] *Hearing on H.B. 2047*, *supra* note 165.

[170] OR. REV. STAT. § 181.642 (2003).

[171] *Consular Notification Bill Effective January 1, 2004*, DPSST BULL., Feb. 2004, at 2, *available at* http://www.oregon.gov/DPSST/docs/BulletinFeb04.pdf.

[172] *See* Peter Shepherd, *The Vienna Convention on Consular Relations: An Oregon Law Enforcement Perspective*, 11 WILLAMETTE J. INT'L L. & DISP. RESOL. 53, 59 (2004).

[173] *Consular Notification Bill Effective January 1, 2004*, *supra* note 171, at 2.

[174] *Id.*

[175] Shepherd, *supra* note 172, at 58.

[176] *Id.*

This group agreed on a way that all foreign nationals would be notified of their consular access rights. They agreed that foreign nationals are to be notified at the time they are received at any Oregon jail, agreed to the content of the notification, and created translations of that notification.[177]

Further, state and local law enforcement agencies have policies enforcing the provisions of Article 36. The Department of Corrections Policy No. 40.2.10 requires all intake staff to determine if incoming inmates are foreign nationals, and if so, to provide proper notice to the inmate and their consulate if so requested.[178] The staff is required to fill out a form indicating the measures they took and get the signature of the inmate.[179] The policy also provides that staff "assist the inmate by providing information on how to contact the consul and/or facilitating the contact as appropriate," and permit the consulate to communicate with and have access to the inmate.[180] The Portland Police Bureau has a similar policy that states that it will comply with the VCCR and provides a procedure for providing notice.[181] The procedure is that any time a foreign national is taken into custody, the arresting member or supervisor will "[a]dvise the individual without undue delay of his/her right to have his/her country notified" and inform the appropriate consulate.[182] The Portland Police Bureau also requires the officer to complete a "Detention of Foreign Nationals Checklist" and include it in their police report.[183]

Oregon's efforts to comply with the VCCR have been aided by federal dissemination of information. While the federal government has not taken any forceful steps to ensure state compliance with the VCCR, such as the enactment of legislation, the U.S. Department of State has provided extensive information to the states.[184] In a 133-page handbook, the U.S. Department of State provides guidance to all levels of law enforcement on how to give full effect to Article 36.[185] The manual, in

[177] *Id.* at 59.

[178] OR. DEP'T OF CORR., CONSULAR NOTIFICATION AND ACCESS: DOC POLICY 40.2.10, at 2 (2005), *available at* http://www.oregon.gov/DOC/PUBSER/rules_policies/docs/40.2.10.pdf.

[179] *Id.*

[180] *Id.*

[181] PORTLAND POLICE BUREAU, MANUAL OF POLICY AND PROCEDURE § 810.10 (2010), *available at* http://www.portlandonline.com/shared/cfm/image.cfm?id=32482.

[182] *Id.* (noting that that since the State Department does not see them as detentions, stops for routine traffic violations and citations do not require notification).

[183] *Id.* This notification of the consulate needs to happen very quickly "as soon as practical and before the end of shift." *Id.*

[184] *See* Edward W. Duffy, Note, *The Avena Act: An Option To Induce State Implementation of Consular Notification Rights After* Medellín, 98 GEO. L. J. 795, 800 (2010) (noting that potential implementing legislation entitled Avena Case Implementation Act of 2008 was never passed into law by Congress); Winer, *supra* note 30, at 363 (arguing that if such legislation is attempted, it may be invalidated).

[185] *See* U.S. DEP'T OF STATE, *supra* note 15.

addition to general information on the VCCR, provides a question and answer section, a "Consular Notification Process" flowchart to determine when to notify the foreign national and the appropriate consulate, many relevant legal documents, and a suggested statement to detained foreign nationals with 20 different translations.[186] Oregon, as mentioned above, has used this manual for its officer training and there are currently links to the U.S. Department of State's website on the DPSST website.[187] The manual was first introduced in January of 1998 and demonstrates the importance, and potential success, of local and state law enforcement in giving effect to the VCCR.[188]

In addition to providing states the manual free of charge, the U.S. Department of State offers free training to any interested law enforcement body.[189] Oregon has taken the State Department up on its offer and most recently, in 2010, training was provided to the Portland Police Bureau, Metro County Sheriff's Office, and Oregon State Police.[190] While Oregon has held five such trainings, it is notable that other states, even those that are not border states, have held significantly more trainings.[191]

Oregon has taken steps to "enable full effect to be given to the purposes for which the rights accorded under [Article 36] are intended."[192] Its primary success is in the area of education. Prior to when Sanchez-Llamas, Chavez, and Reyes-Camerena were not given notice of their consular rights, many Oregon law enforcement officers were also unaware of those rights.[193] Now, Oregon law enforcement officers are required by statute to know about the rights of foreign nationals under Article 36.[194] This, in addition to the procedures adopted by law enforcement bodies, should go a long way in ensuring that foreign nationals receive actual notice.

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[186] *See id.*

[187] http://www.oregon.gov/DPSST/RT/docs/ConsularNotificationAccess/subpages/consul_notify.html (although it is notable that these documents are not easily found unless specifically searched for).

[188] *See* Schiffman, *supra* note 142, at 56–57 ("The U.S. State Department took a substantial step in January 1998 with the publication of its manual, 'Consular Notification and Access: Instructions for Federal, State, and other Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them.' . . . Furthermore, the manual underscores the importance of the cooperation of local law enforcement in assuring U.S. treaty compliance and ultimately securing those same rights for U.S. nationals abroad.").

[189] U.S. DEP'T OF STATE, *supra* note 15, at ii.

[190] *See* U.S. DEP'T OF STATE, CONSULAR NOTIFICATION OUTREACH (Nov. 17, 2010), *available at* http://www.travel.state.gov/jamy3.html#OR.

[191] *Id.* For example, see the entries for California, Colorado, and North Carolina.

[192] Vienna Convention, *supra* note 13, at art. 36(2).

[193] *See infra* notes 165–66 and accompanying text.

[194] *See* OR. REV. STAT. § 181.642 (2009).

V. CONCLUSION

In his dissenting opinion in *Medellín*, Justice Breyer warned "of worsening relations with our neighbor Mexico, of precipitating actions by other nations putting at risk American citizens who have the misfortune to be arrested while traveling abroad, or of diminishing our Nation's reputation abroad as a result of our failure to follow the 'rule of law' principles that we preach," as a result of the majority's refusal to enforce the judgment of the ICJ in *Avena*.[195] Hopefully, Oregon's steps to educate its law enforcement officers, and its procedures to ensure that consular notification is routinely given, have helped prevent this result.

The Court and the federal government were caught between the competing obligations of complying with international law and upholding the principles of federalism espoused in the U.S. Constitution. It cannot fully give effect to one without impinging upon the other. The proactive role that states may take, and in the case of Oregon, have taken, may allow the federal government the luxury of not needing to choose one critical interest over another.

Effective domestic enforcement of Article 36 of the Vienna Convention is critical to the United States to encourage the protection of its nationals traveling and living abroad. When consular notification and access is not provided domestically, and the U.S. courts do not provide a remedy for lack of notification, it is difficult to expect other state parties to notify and remedy breaches with respect to U.S. citizens. On the other hand, the United States has a valid federalism concern in limiting available remedies. The decision in *Medellín* shows the reluctance of the Supreme Court to allow non-self-executing international law, even when accompanied by an executive order, to preempt state law by bypassing state procedural-default rules.

The only way left to balance these two conflicting interests is to consistently provide foreign nationals notice of consular access rights, notice to the consulate when their nationals are detained, and to do so without delay after detention as the Vienna Convention requires. Without implementing legislation, and because state or local law enforcement officers conduct most arrests and detentions, the federal government has called upon the states to ensure that consular notification and access is provided. Oregon has answered the call.

[195] Medellín v. Texas, 128 S. Ct. 1346, 1391 (2008) (Breyer, J., dissenting).